



BOARD OF INQUIRY (*Human Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended;

AND IN THE MATTER OF the complaint by Ellen Anderson dated December 6, 1994 and the complaint by Lucia M. O'Neill dated September 14, 1995, alleging discrimination in the provision of services on the basis of sex.

B E T W E E N:

Ontario Human Rights Commission

Commission

- and -

Ellen Anderson and Lucia O'Neill

Complainants

- and -

The YMCA of Barrie

Respondent

DECISION ON IMPLEMENTATION

Adjudicator: Heather M. MacNaughton

Date: April 17, 2001

Board File Nos: BI-0264/99 and BI-0265/99

Decision No: 01-007-I

Board of Inquiry (*Human Rights Code*)

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APPEARANCES

Ontario Human Rights Commission)	Naomi Overend, Counsel
)	
Ellen Anderson)	
<i>Complainant</i>)	On her own behalf
)	
Lucia O'Neill)	
<i>Complainant</i>)	On her own behalf
)	
)	
The YMCA of Barrie)	
<i>Respondent</i>)	John Anderson, Counsel
)	

THE ISSUE

On December 6, 2000, I released my decision in this matter (the “Decision”). I found, based on facts agreed to by the parties, that the facilities as they existed at the Barrie YMCA constituted an infringement of the rights of Ellen Anderson and Lucia O’Neill under section 1 of the Ontario *Human Rights Code* R.S.O. 1990, c. H. 19 as amended (the “Code”).

In the Decision, I said that the Board of Inquiry would remain seized, with respect to issues arising, until the completion of the construction of a Women’s Plus facility as ordered.

On February 15, 2001, the hearing reconvened by conference call to deal with two matters raised by the Complainants and the Ontario Human Rights Commission (the “Commission”). The first matter was the failure of the YMCA to post the Decision as required by my Order, the second was the failure of the YMCA to provide architect’s drawings reflecting a Women’s Plus Facility comparable to that of the Men’s Plus Facility. The parties had filed briefs of documents which they wished me to review and I heard submissions from Counsel for the Commission, concurred in by the Complainants, and from Counsel for the Respondents. For reasons that will be explained in the paragraphs that follow, this decision deals only with the first issue raised by the Complainants and the Commission.

THE POSTING OF THE DECISION

The facts with respect to this issue were not in dispute.

The Facts

As indicated above, the Decision was signed on December 6, 2000, and released to the parties by the Board of Inquiry on December 7. It was faxed to Counsel for both the Commission and the Respondent, and mailed to the Complainants.

On December 15, 2000, Ms. Anderson advised Counsel for the Commission that the decision had not been posted at the Barrie YMCA. Counsel for the Commission wrote to Counsel for the Respondent inquiring why the YMCA had not posted the Decision. He responded that he had not received a copy of the Decision from the Board of Inquiry and that the YMCA was waiting for an original of the Decision which, on receipt, they would post.

Counsel for the YMCA mistakenly believed that the Commission, and not the Board of Inquiry, had sent the copy of the Decision which he received by fax. An exchange of correspondence followed in which this misunderstanding was clarified. The intervening holiday season meant that the decision was not posted until January 2001.

The Submissions of the Commission and the Complainants

Counsel for the Commission, and the Complainants, do not suggest that the failure to post the Decision by the YMCA, or its Counsel, was intentional. Nor do they suggest that there was any deliberate flouting of the Decision and the Order contained in it. However, they submit that the error rendered ineffective a Communications Agreement which had been entered into by the parties separately from the agreement that led to the Decision.

Further, Counsel for the Commission submits that the late posting of the Decision compounded a disturbing trend that she observed during the course of the hearing. That trend, she submitted, was that the YMCA defended the non-existence of a Women's Plus facility on the basis that women members, when surveyed, had not expressed an interest in one.

In support of that submission, Counsel for the Commission, referred to recent communications between the YMCA and its members, and a number of public statements, which she submits, downplays the role of the Complainants and their human rights complaints, in achieving equality of

the facilities at the Barrie YMCA. Counsel for the Commission submits that these communications, read together, intentionally leave the impression that construction of a Women's Plus facility is proceeding at this time because "the time has come".

She further submits that the evidence at the hearing does not support the YMCA's contention that it had earlier surveyed its members.

The Submissions of the Respondent

Counsel for the Respondent submits that the late posting of the Decision was an error. It was not intended to flout either the spirit, or the intent, of the Communications Agreement or the Decision.

Counsel for the Respondent submits that the Communications Agreement was negotiated separately from the settlement that resulted in the Decision. Hence, it did not form a part of the settlement agreement which was incorporated in the Decision. He submits that, so long as the requirements of my Decision are met, I have no jurisdiction to deal with issues arising from the Communications Agreement and should not make factual findings based on evidence that had not been concluded.

Counsel for the Respondent submits that it is not appropriate for me to control the communications of either party regarding this matter. His client was, he says, entitled to develop a communications strategy with respect to the Decision, so long as it did not breach the Communications Agreement. They have done so, as has the Commission and the Complainants.

In that regard, he submits that the YMCA member bulletins, relied on by the Commission in support of its submissions, are update bulletins regarding the progress of the construction. They are intended to elicit input into the design and are, he submits, separate and apart from the communication referred to in the Decision and required to be placed in the membership newsletter.

The inclusion of a synopsis of the Decision was a part of my Order, the wording of which was to be agreed. I was advised that agreement was reached on the content of the synopsis in the Communications Agreement.

Decision

The Communications Agreement was not before me. It was an agreement executed by the parties, having binding effect as between them. I was not asked to incorporate its terms into the Decision and, therefore, its contents do not form part of my Order. As a result, I have no jurisdiction to deal with the terms of the Communications Agreement or the intent of the parties with respect to it.

The only issue properly before me is whether the Respondents have complied with the Decision as it related to posting of the Order. In the Decision I ordered:

The Barrie YMCA shall communicate this decision to the membership by posting a copy of it on the Community bulletin board, located at the Key Desk, until the completion of the women's membership plus facility. It shall post a copy of this decision on the bulletin boards located inside the women's, girl's, men's and men's plus locker rooms, and on the bulletin board outside the conditioning room until April 1, 2001. In addition, the Barrie YMCA shall publish a synopsis of the decision in the membership newsletter. The above communication shall be in a manner agreed to by the parties.

The Decision does not require posting by a particular date. It was open to the parties to set a posting deadline after receipt of the Decision but they did not do so. I think it likely that the parties intended that the Decision be posted as soon as possible after its release. Further, it appears that the Complainants wished it to be posted during the holiday season to coincide with the initial press interest following the release of the Decision, and when a large number of members would be likely to see it. However, while this may have been the spirit of their agreement, it did not form part of the Order.

To the extent that the Complainants, and Counsel for the Commission, object to the YMCA's suggestion that women members were surveyed before the 1994 renovations, I made no evidentiary findings in that regard. It was clear from the tone of the cross-examination that the parties differed on how they characterized the contact the YMCA Board and management staff had with women members before the 1994 renovations. The YMCA felt that it had surveyed its women members with respect to the wish for a Membership Plus facility. It was equally clear that the Complainants and the Commission disagreed. As a result of the settlement that was achieved between the parties I was not required to, and did not, make any factual finding as to whether the YMCA had "surveyed" its women members in 1994.

Having issued the Decision based on an agreed statement of facts, prior to the completion of the evidence and argument, it would not now be appropriate for me to make any findings in that regard. Suffice it to say that I found, based on the agreement of the parties that the facilities as they currently exist, are discriminatory. The YMCA is required to remedy that discrimination and must do so in a timely fashion.

Having heard all of the submissions and reviewed the relevant communications, together with the wording of the Communications Agreement, I find that there was no breach of the Order and that no further action is required by the YMCA. The YMCA has offered to continue posting the Decision until May 2001, a one-month extension from the expiry of the original Order, and I consider that a good-faith attempt by the YMCA to remedy the difficulty created by their error. I am satisfied that no order is required with respect to this matter.

THE FAILURE TO PRODUCE ARCHITECT'S PLANS REFLECTING COMPARABLE FACILITIES

The second issue concerns the decision of the YMCA not to renovate the Men's Membership Plus facility at this time. The facts with respect to this issue are not in dispute.

The Facts

During the settlement discussion between the parties the YMCA produced plans for a Women's Plus facility. The settlement agreement was based on those plans and that agreement was reflected in the Decision which requires that:

The Barrie YMCA will build a women's membership plus change facility, comparable in size and amenities to its **revised** men's membership plus facilities. The parties shall have the right to review the plans for these facilities, and forward any concerns about the parity of the facilities to this Board. (emphasis added)

Following the settlement agreement, and the issuance of the Decision, revised plans were produced by the YMCA's architects which did not include alterations to the size of, or amenities in, the Men's Plus facility.

The Submissions of the Commission

Counsel for the Commission submits that it was clear, when the settlement agreement was negotiated, that the Barrie YMCA, in addition to constructing a Women's Plus facility, was going to renovate the Men's Plus facility. On seeing the revised plans, Counsel for the Commission, and the Complainants, expressed concern that the space allotted for the Women's Plus facility was less than that available to the Men's Plus facility. They submitted that the facilities were not comparable and, hence, did not meet the requirements of the Decision.

Further, Counsel for the Commission submits that the Men's Plus facility is a 1978 facility and cannot, without renovations, be comparable, insofar as amenities, to the new Women's Plus facility which will be built to current day specifications. She submits that differences in the age and quality of the amenities were all intended to be rectified by one renovation.

The Complainants filed a report from ROMA, a design firm, which compared the difference in space allocated to the existing Men's Plus and proposed Women's Plus facilities and concluded that there was approximately 12 percent less space available for women. The report also raised traffic flow concerns about the design and concerns about the limited number of toilets. All of these issues lead the Complainants, and Counsel for the Commission, to submit that neither the space nor the amenities in both facilities are comparable.

The Submissions of the Respondent

Counsel for the Respondent acknowledges that there has been a change in the plans being proposed by the YMCA. However, he submits that the gross floor area of the addition for the Women's Plus facility is 240 square meters and that the existing Men's Plus facility has a gross floor area of 245 square meters. These dimensions are, he submits, comparable.

Further, Counsel for the Respondent submits that the current plans achieved comparability by increasing the size of the building footprint for the Women's Plus facility, rather than taking space away from the Men's Plus facility as was originally contemplated. This proposal is, he submits, in accordance with the intent of the Decision which was not meant to be inflexible as evidenced by the parties retaining the ability to seek my guidance and, if necessary, supplementary orders.

DIRECTION

During the course of the argument, it became apparent that the drawings that had been reviewed by ROMA, and commented on in its report, were not the most recent drawings. Further, there existed in the evidence, a number of different calculations of the area available to both the Men's and proposed Women's Plus facilities. Some of the plans and documents referred to 'gross floor area'

while others referred to 'net usable area'. Therefore, it was not possible to reach any conclusions regarding the comparability of the space.

I ordered the YMCA to produce from its architects, Salter, Farrow, Pilon, ("Salter") a comparison of the two facilities on the same basis. I received that comparison on March 12, 2001 attached to a letter from Counsel for the Respondent in which he makes further submissions.

In the comparison, Salter writes that the only meaningful way to compare the space allocated to the Men's Plus and proposed Women's Plus facilities is to look at the net area of each space. That is the actual area measured from the inside face of the enclosing walls. Applying that measurement, Salter concludes that the net area of the existing Men's Plus facility is 238.2 square meters, as compared to the net area of the proposed Women's Plus facility of 226.1 square meters. The difference is 5.1%.

On April 4, 2001, I received submissions from the Commission in response to both the submissions from Counsel for the Respondent and to the letter from Salter. In it the Commission repeats its earlier position that refurbishment of the Men's Plus facility was always intended by the parties, raises concerns about the failure of the YMCA to proceed with construction and the "stalling" by the Respondents, and seeks to cross-examine Salter with respect to the issues addressed in their letter.

In light of the further submissions from both parties, I have concluded that the hearing should reconvene to address the outstanding issue and any others that have arisen in the interim. The Board will contact the parties to set dates for an in- person hearing and to canvas whether or not the parties would benefit from the services of a Board Mediator.

Dated at Vancouver, this 17th day of April, 2001

Heather M. MacNaughton

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